

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL MENDIOLA,	)	Case No. 07-CV-0130-W (JMA)
	)	
Petitioner,	)	<b>REPORT AND RECOMMENDATION BY</b>
	)	<b>UNITED STATES MAGISTRATE JUDGE</b>
v.	)	<b>REGARDING RESPONDENT'S MOTION</b>
	)	<b>TO DISMISS PETITION</b>
W.J. SULLIVAN, Warden,	)	
	)	
Respondent.	)	
	)	
_____	)	

Petitioner initiated this action by filing a Petition for Writ of Habeas Corpus on January 19, 2007. [Doc. No. 1] The Court dismissed the Petition without prejudice and with leave to amend on February 6, 2007. [Doc. No. 3] Thereafter, Petitioner filed a First Amended Petition on April 26, 2007 (nunc pro tunc to April 19, 2007). [Doc. No. 10] The First Amended Petition raises a single ground for relief: that Petitioner's Sixth Amendment right to trial by jury was violated when the trial court imposed an upper term sentence based upon judicial fact-finding by a preponderance of the evidence, citing Apprendi v.

1 New Jersey, 530 U.S. 466 (2000) and People v. Black, 35 Cal.4th  
2 1238 (2005). (First Amended Petition at 6 and Appendix "A.")

3 On July 5, 2007, Respondent filed a Motion to Dismiss the  
4 Petition (the "Motion"), which appears to contend that Petitioner  
5 has not exhausted available state remedies regarding the five (5)  
6 grounds for relief raised in the original Petition, but does not  
7 address the single ground raised in the First Amended Petition.  
8 [Doc. No. 18] The First Amended Petition was filed prior to the  
9 Court's Order Requiring Response to Petition [Doc. No. 14, filed  
10 May 8, 2007), and the Court docket indicates that the First  
11 Amended Petition was served on the office of Respondent's  
12 counsel. More than two months after the First Amended Petition  
13 was filed, Respondent filed the Motion, and it fails to address  
14 the First Amended Petition.

15 Accordingly, the undersigned magistrate judge finds and  
16 recommends that the Motion should be DENIED as mooted by  
17 Petitioner's filing of the First Amended Petition.

18 This Report and Recommendation is submitted to the Honorable  
19 Thomas J. Whelan, United States District Judge assigned to this  
20 case, pursuant to the provisions of 28 U.S.C. § 636(b)(1).

21 **IT IS ORDERED** that no later than October 12, 2007 any party  
22 may file written objections with the Court and serve a copy on  
23 all parties. The document should be captioned "Objections to  
24 Report and Recommendation."

25 **IT IS FURTHER ORDERED** that any reply to the objections shall  
26 be served and filed no later than October 26, 2007. The parties  
27 are advised that failure to file objections within the specified  
28 time may waive the right to raise those objections on appeal of

1 the Court's order. See Turner v. Duncan, 158 F.3d 449, 455 (9th  
2 Cir. 1998); Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 **IT IS SO ORDERED.**

4 DATED: September 24, 2007

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6 Jan M. Adler  
7 U.S. Magistrate Judge  
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